

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOE MACK BROWN,

Petitioner,

Civil No. 03-202-CO

FINDINGS AND RECOMMENDATION

v.

JEAN HILL,

Respondent.

COONEY, Magistrate Judge:

Petitioner has filed a motion for voluntary dismissal of petition for writ of habeas corpus without prejudice (#46). The time for response has passed, and respondent has not filed any objection to the motion.

I. DISCUSSION

After a defendant has filed an answer or motion for summary judgment, an action may be dismissed voluntarily at plaintiff's request only by order of the court and "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). In the Ninth Circuit, "Although costs and attorney fees are often imposed upon a plaintiff who is granted a voluntary dismissal under Fed.R.Civ.P. 41(a)(2), no circuit court has held that payment of the defendant's costs and attorney fees is a prerequisite to an order granting voluntary dismissal." Stevedoring Servs. of Am. v. Armilla

Int'l B.V., 889 F.2d 919, 921 (9th Cir. 1989) (and cases cited); 9 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 2366 (2d ed. 1995). Petitioner requests that this case be dismissed without prejudice, and respondent has not filed any objection.

The court finds that, in the circumstances, this action should be dismissed, without prejudice, and without fees and costs imposed.

II. RECOMMENDATION

For the foregoing reasons, petitioner's motion for voluntary dismissal of petition for writ of habeas corpus (#46) should be granted, without prejudice, and without fees and costs.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. **The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have ten days within which to file a response to the objections.** Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this __25__ day of April, 2005.

_____/s/_____
UNITED STATES MAGISTRATE JUDGE